

INITIAL STATEMENT OF REASONS

FOR ADOPTION OF REGULATIONS TO APPROVE TECHNICAL ASSISTANCE PROVIDERS AND CERTIFIERS FOR THE CALIFORNIA CLIMATE ACTION REGISTRY

Docket No. 03-QCTA-1
April 2004

I. STATEMENT OF SPECIFIC PURPOSE AND RATIONALE

The California Climate Action Registry (Registry) was established in September, 2000 by SB 1771 to accept California and national reports on greenhouse gas emissions from companies with operations in California. SB 527, enacted in October, 2001, clarified the roles and responsibilities of the Registry and the California Energy Commission (Commission). The purposes of the Registry include enabling participating entities to voluntarily record greenhouse gas emissions in a consistent certified format and to ensure that sources in the State receive consideration for certified emissions results under any future State, federal, or international regulatory regime relating to greenhouse gas emissions.

The Commission is proposing to adopt the following regulations to comply with Health and Safety Code section 42870, which requires the Commission to set forth a process for qualifying certifiers and technical assistance providers who wish to provide services to Climate Action Registry participants.

II. DOCUMENTS AND REPORTS RELIED UPON

The Commission has relied upon the following technical, theoretical, or empirical study, report, or similar documents in drafting the proposed regulations:

“Request For Applications To Qualify as Certifier for California Climate Action Registry Participants: Request For Applications.” California Energy Commission, January 31, 2003.

“Request For Applications To Qualify as Certifier for California Climate Action Registry Participants: Conflict of Interest.” California Energy Commission, February, 2003.

III. CONSIDERATION OF REASONABLE ALTERNATIVES, INCLUDING THOSE THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESS

Before adopting the proposed regulations, the Commission must determine that no alternative considered by it would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

To date, the Commission is not aware of any reasonable alternatives to the proposed regulations, including reasonable alternatives that have otherwise been identified and brought to the attention of the Commission, that would be more effective and/or less burdensome than the proposed regulations in carrying out the requirements of Health and Safety Code section 42870.

TECHNOLOGY AND ALTERNATIVES

The proposed regulations would not impose any specific technology or equipment requirement.

IV. IMPACT ON BUSINESS

The Commission did not identify any significant adverse economic impacts upon business from the proposed regulations. The proposed regulations merely set forth the qualification criteria necessary for those organizations wishing to provide services as a technical assistant or certifier for Registry participants. The program is voluntary and the regulations do not impose any cost on businesses not wishing to provide services to Climate Action Registry participants. If an organization does choose to participate, the costs of reasonable compliance with the proposed regulations would be insignificant; these costs entail the initial cost of compiling the necessary information for the required application and the subsequent annual costs of reporting any changes to this information. The Commission has solicited the comments of staff and affected entities with the specific goal of considering all means to minimize any potential impacts of the approval process. The Commission is therefore unaware of any alternatives which would present less of an impact upon small business.

V. DUPLICATION OR CONFLICTS WITH FEDERAL REGULATIONS

There are no comparable federal regulations or statutes governing the qualification of businesses wishing to act as technical assistance providers or certifiers for Climate Action Registry participants. Thus, there are no duplications or conflicts with any federal regulation or statute.

VI. DISCUSSION OF SPECIFIC REQUIREMENTS

2800. Purpose of Regulations

Explains that the purpose of these regulations is to promulgate a process to qualify organizations wishing to act as technical assistance providers or certifiers for Climate Action Registry participants.

2801. Definitions

This section provides definitions necessary to understand the key terms used in the regulations.

2810. Information Requirements for Applications for Technical Assistance Providers

This section describes the basic information an applicant must provide to the Commission when applying to be approved as a technical assistance provider. This section requires the applicant to

provide a list of qualified staff and their resumes, a list of any judicial proceedings recently filed against the applicant, and two samples of work product that demonstrate the applicant's competence in at least one of several fields related to the estimation of greenhouse gas emissions.

A list of the applicant's staff and their resumes is necessary to evaluate whether the applicant employs knowledgeable and experienced staff. A list of any judicial proceedings recently filed against the applicant will enable the Commission to determine if the applicant may have engaged in activities that would hinder it from carrying out its responsibilities as a state-approved technical assistance provider. The provision of work product samples will enable the Commission to assess the quality of work, engineering ability, auditing capability, and other areas of expertise in which the applicant is competent. The prohibition against the submittal of confidential information ensures that the Commission's qualification process is open and transparent.

2811. Minimum Requirements for Technical Assistance Providers

This section requires that a technical assistance provider have at least two years of experience in at least one of several topic areas related to greenhouse gas emissions in order to be considered for approval. This criterion is necessary to better ensure that the applicant has the necessary experience to successfully conduct activities required of a technical assistance provider.

2820. Information Requirements for Applications for General and Industry-Specific Certifiers

This section describes the basic information an applicant must provide to the Commission when applying to be approved as a certifier. The applicant is required to submit financial statements from the previous year, a copy of its professional liability insurance policy, a list of staff who will be conducting certification services, a list of any judicial proceedings recently filed against it, three samples of work product with at least one reference for each sample, a description of its anticipated approach to certification work, a cover page, a firm status sheet listing the vital statistics of the applicant, a description of how staff knowledge is updated, and a description of the policies and mechanisms in place to prevent, identify, and resolve any potential conflict of interest. A certifier may be held liable for its certification opinion and certification activities; therefore it must have adequate insurance. A typical premium of \$1,000,000 dollars will likely meet the need for liability coverage.

The last requirement is necessary to confirm that the applicant has sufficient internal safeguards in place to ensure the impartiality of its certification activities. The required information will provide a basis for assessing the potential for any unchecked conflict of interest and for making case-by-case determinations of the existence of a conflict of interest. The information enables the Commission to understand the activities of any related entities and would highlight specific related entities that would more likely engage in activities that would cause a conflict of interest. Because of shared ownership, related entities have the potential to influence certifiers; hence, information on related entity activities is necessary. This information will expedite case-by-case determinations of the potential for conflict of interest by allowing the Commission to have a more focused, customized investigation.

2821. Minimum Requirements for General Certifiers

This section sets forth the minimum criteria that a firm must meet in order to qualify to certify Registry participants under the General Reporting Protocol. It requires that an applicant must have been in business for at least four years prior to applying, must have a minimum revenue of four million dollars, must have a minimum of 15 staff (7 of which must be directly employed by the applicant) designated to work on certification matters who have experience in at least one of several areas related to greenhouse gas emissions, must demonstrate knowledge in each of several areas related to greenhouse gas emissions, and must have at least two years of experience in verifying greenhouse gas emissions.

Requiring knowledge in the specified areas will ensure that a certifier will be able to accurately evaluate a participant's program. Requiring an applicant to have relevant experience will ensure that it has the necessary skills to undertake certification. The requirement that each applicant have at least 15 staff is needed to ensure that certifiers have an adequate breadth of experience and staffing to possibly undertake several simultaneous certifications with Registry participants representing various diverse types of organizations; a firm with inadequate staffing may overextend or take on certifications that are beyond the ability of the certifier, thus compromising any resultant certification. An applicant with at least \$4,000,000 in annual revenue demonstrates the financial stability necessary to employ 15 designated staff and reflects an applicant's capability to complete certification activities. The requirement that an applicant must employ at least seven staff ensures that a minimum of coordination and oversight is inherent in the applicant's team structure; for this reason the number of individual subcontractors allowed is limited. This will lessen the possibility of adverse outcomes due to unwieldy team structure. The requirement that an applicant must have been in existence for at least four years demonstrates company continuity which is necessary to provide some assurance that the company is likely to exist into the foreseeable future and thereby provide stability to the pool of certifiers and lessen the potential for any conflict of interest.

2822. Minimum Requirements for Industry-Specific Certifiers

This section sets forth the minimum criteria that a firm must meet in order to qualify to certify Registry participants under the Industry-Specific Reporting Protocol. Applicants must satisfy the requirements in section 2821, except that they are only required to have a minimum revenue of one million dollars and a minimum of seven staff (five of which must be directly employed by the applicant). Each applicant must employ staff with the knowledge and experience appropriate for the specific industry it wishes to certify. Since the types of company and number of companies for which an industry specific certifier will conduct certification is limited, the staffing levels necessary to ensure knowledge, experience, and adequate staffing is less than that necessary for a general reporting protocol certifier. Consequently, the necessary minimum revenue is also less.

2823. Partnering

This section allows a firm to coordinate with other firms in meeting the qualification requirements for a certifier. It also sets forth which firms will automatically be designated partners to an applicant and the requirements that each partner must comply with. Partnering allows small companies to qualify as certifiers, and is necessary to avoid discriminating against small companies in meeting the minimum requirements. Companies that are relied upon by an applicant to meet the minimum requirements are automatically designated as partners to the applicant; this ensures that when a team is approved to certify Registry participants, all the resources of that team are used to provide certification services.

2830. Issuance of Request for Applications

This section sets a deadline for the submission of an application no less than 30 days after the issuance of a Request for Applications (RFA). Establishing a deadline provides certainty to the applicant and Commission regarding the timeframe for the qualification process and providing at least thirty days ensures that the applicant has sufficient time to compile an application.

2831. Review of Applications

This section sets forth the process by which the Commission will review applications for certifiers and technical assistance providers. An evaluation committee consisting of at least one Commission and one Registry representative will review all complete applications that comply with the format requirements; this is necessary to ensure that the interests of the state and the Registry program are protected. By having at least three members, individual differences in scoring applicants will be balanced against the larger group thereby providing a more impartial and objective evaluation.

The designation of 60 as the passing score ensures that an applicant sufficiently possess a minimum level of knowledge and experience to ensure it can competently perform certification activities.

The availability of interviews for those applicants who do not immediately attain a passing score provides them an opportunity to clarify misunderstandings due to issues that may not bear on their ability to successfully undertake certifications. This ensures that the evaluation process is fair and flexible enough to take into consideration the whole of an applicant's capabilities.

2832. Grounds for Rejection of an Application

This section sets forth the grounds upon which an application may be rejected. An application may be rejected if it is incomplete, filed late, contains false information, is not prepared with the appropriate forms, is not signed, contains too much confidential information for certifier applications, contains any confidential information if a technical assistance provider application, or if the applicant has a conflict of interest with the Commission's Climate Change Program or with the Registry. Giving the Commission the ability to reject applications on these grounds ensures that the Commission will not be forced to waste time on applications that were not

prepared in an adequate fashion. This ensures that the Commission will be able to efficiently process those applications that have been adequately prepared.

2833. Modifying an Application

This section allows an applicant to modify their application prior to the application submission deadline in order to meet the information requirements of an application. The applicant should be able to present the best application possible. By allowing an application to be modified prior to the submission deadline, the applicant is given more flexibility in the application process without affecting the Commission's timeline for review.

2834. Notification of the Results of the Evaluation

This section requires the Commission to notify applicants of the results of the evaluation of their application by mail within 30 working days of the submittal deadline or within 10 working days of receipt by the Commission of complete conflict of interest information, whichever is later. The Commission will need adequate time to evaluate the applications; based on prior experience with similar tasks, 30 working days will provide the necessary review time. In the event the Commission requests additional information in order to establish a foundation upon which to undertake an evaluation of conflict of interest, additional information may be received after the application submittal date. In this situation, setting a notification deadline ten working days after the receipt of complete information, will give the Commission adequate time to process notification to the applicant.

2835. Appeal of Determination

This section allows and applicant to appeal a negative evaluation first to the Evaluation Committee and then to the Transportation Committee. The evaluation process should be fair and objective; thus, the applicant should be allowed an opportunity to dispute an evaluation and to further clarify the merits of its application. The Evaluation Committee will necessarily be the most familiar with the application and can most quickly consider any clarifications when an appeal is first filed. If the Committee's determination is not acceptable to the applicant, allowing the applicant to raise a dispute to the Commission's Transportation Committee ensures the applicant will have an opportunity to present its application to another objective committee that may have a perspective different from the Evaluation Committee. Requiring the Transportation Committee to consult with the Registry President ensures that the Registry's opinion will also be taken into consideration.

2836. Document Disposition

This section explains that applications become the property of the State upon submittal and all non-confidential material becomes part of the public record. This section also requires that the Commission retain the original application for three years after the approval process has ended and return any copies of confidential material to the applicant. By requiring the retention of all application materials, the Commission will be able to provide documentation in the event of any

future inquiries regarding the qualifications of a certifier. Requiring the Commission to return all copies of confidential information and retain only the original will reduce the risk that confidential information could be accidentally disclosed.

2837 Confidential Data

This section allows an applicant to apply to submit certain information confidentially. Applicants may have difficulty providing an accurate accounting of their qualifications unless allowed to provide confidential information.

2840. Applicability

This section limits the applicability of the conflict of interest requirements to certifiers. Certifiers are tasked with providing an objective certification opinion; therefore, it is critical that any conflict of interest be avoided to prevent situations where it would be difficult for the certifier to maintain objectivity. Technical Assistance Providers, on the other hand, merely assist a Registry participant with various aspects of its reporting and are not tasked with providing an objective audit of the emissions calculations; therefore, the potential existence of a conflict of interest is not a concern.

2841. Conflict of Interest Information Requirements for General and Industry-Specific Certifiers

This section sets forth the information that each certifier must provide to the Commission before it may begin certifying a Registry participant's emissions, including a self-evaluation of the potential for a conflict of interest. This section also sets forth guidance of when the potential for a conflict of interest may be deemed to be high, medium, or low. The Commission must have adequate information upon which to make a case-by-case determination of conflict of information. The factors used in the Commission's determination would include the items of information listed in this section, including the nature of work previously performed by the certifier for the Registry participant, the current relationship between the certifier and the Registry participant, and the cost of the certification.

Requiring a self-evaluation of the potential for a conflict of interest from the certifier is beneficial in that it 1) allows the certifier control over the initial phase of the conflict of interest case-by-case process, thereby limiting negative perceptions on the part of the certifier of the process, 2) requires the certifier to carefully consider the information contained in the documents being compiled and reported to the Commission, 3) provides the certifier a better idea of the eventual Commission determination, thereby allowing the certifier to avoid the effort of further negotiating with a Registry participant in instances that would likely yield a negative determination, and 4) lessens the burden on Commission staff by providing guidance on compiling and organizing information to be submitted to the Commission.

Requiring a self-evaluation of high, medium, and low potential for a conflict of interest from the certifier is beneficial in that it provides guidance to the certifier but does not try to define the

infinite number of possible case-by-case scenarios. Situations that likely represent a high potential for a conflict of interest can tentatively be identified by the certifier as well as situations that likely represent a low potential for a conflict of interest. This will limit the uncertainty for the certifier of the eventual determination. Further it avoids requiring the certifier to state whether they consider their situation as representing a conflict of interest or not. This is beneficial because it provides more flexibility in discussions with the Commission and it may lessen disputes between the certifier and Commission regarding the eventual determination. Requiring a self-evaluation of high, medium, and low potential for a conflict of interest more clearly separates the certifier's self-evaluation from the Commission's determination of acceptable or unacceptable potential for conflict of interest. Situations the certifier identifies as medium potential for conflict of interest will likely require the most effort on the part of the certifier and Commission; knowing this will be useful to the certifier in deciding whether to continue to pursue a contract with the Registry participant before approaching the Commission.

This section defines situations that constitute a high, low, and medium potential for a conflict of interest. These situations are examples of a certifier certifying their own work, performing management function for the client, or acting as an advocate for the client; all of which would have a high potential of causing the certifier to be biased in their certification opinion. Situations that would represent a low potential for a conflict of interest are instances where the potential financial value of the data being reported is low, there has been no previous relationship with the Registry participant, or the financial value of previous contracts are low. Situations that are neither high nor low, are deemed to present a medium potential for a conflict of interest. The certifier is required to provide a mitigation plan if the potential for a conflict of interest is medium; this provides additional flexibility for the certifier in creating a situation that the Commission determines has an acceptable potential for a conflict of interest.

2842. Conflict of Interest Determinations

This section explains that if a certifier has an unacceptable potential for a conflict of interest, the Commission will recommend that the Registry not accept the certifier's certification report. This section requires the Commission to consider the certifier's self-evaluation in reaching any conclusion regarding the potential for a conflict of interest. If the Commission concurs with the certifier's determination that there is a high potential for a conflict of interest, then the Commission must deem the potential for a conflict of interest to be unacceptable. If the Commission concurs with the certifier's determination that there is a low potential for a conflict of interest, then the Commission must deem the potential for a conflict of interest to be acceptable. If the Commission concurs with the certifier's determination that there is a medium potential for a conflict of interest, the Commission may consider other factors in determining whether this potential is acceptable or unacceptable. This allows the Commission to more fully consider factors that the certifier may have neglected. This process provides the Commission with the ability to make final determinations while at the same time considering the certifier's perspective.

2843. Notification of Determination

This section requires the Commission to notify the certifier in writing when the conflict of interest information provided is complete and when determination over the potential for a conflict of interest is reached. Written notification provides certainty to an applicant, formal documentation, and delineates the beginning and end of the 10 day clock for a conflict of interest determination.

2844. Notice of Certification Services

This section requires a certifier to submit a Notice of Certification Services to the Commission outlining the services to be performed and including information on the Registry participant involved. Notice is necessary to provide the Commission with the necessary information to assess whether the Commission should make an onsite visit of the Registry participant's facilities during certification. The 10 day lead time is necessary to allow the Commission the time to arrange for an onsite visit.

2845. Monitoring Conflict of Interest Situations

This section requires a certifier to continue to ensure that no conflict of interest exists between it and the participants it is certifying. This requirement is in place during the provision of certification services and for one year after. If a conflict of interest appears during this time period, the certifier must immediately notify the Commission and explain the actions it will take to address the conflict. The certifier, or any related entities thereof, could undertake activities that represent a conflict of interest during a certification, thereby compromising the objectivity of the certification. Alternatively, activities undertaken after certification could result in financial gains that were anticipated during certification, and thus, could have influenced the certification opinion.

This section provides a mechanism to avoid or neutralize a conflict of interest. Conflict situations would be revealed during subsequent conflict determinations for the Registry participant's annual certifications. A one year notification period would encompass the time between annual certifications and provide the Commission with information in a more timely manner and allow a certifier an opportunity to address conflict situations as they arise.

2850. Adding or Deleting Designated Staff

This section allows a certifier to add or delete staff at any time as long as certain specified information regarding the change is provided to the Commission. A certifier is approved, in part, based upon the staff employed. If a certifier adds or deletes staff, the Commission will need to monitor whether a certifier retains adequate qualified staff to maintain approval. By being apprised of any updates to staff information, the Commission is able to keep a current list of a certifier's staff.

2851. Renewal of Approval

This section limits the approval of a certifier or technical assistance provider to three years, after which time a firm must re-apply. A certifier or technical assistance provider's company make up could change after being approved. Additionally, a company may gain new experience or what was relevant experience may become outdated. Because of these potential changes, reapplication is necessary to ensure that service providers maintain the required qualifications. A three-year period between renewal balances the burden of applying with the likelihood of significant company changes.

2852. Rescission of Approval

This section allows the Commission to rescind the approval of a certifier or technical assistance provider for specified reasons. These include failure to sustain qualifications, failure to comply with Registry policies, failure to comply with conflict of interest requirements, or being guilty of gross negligence, inexcusable neglect of duty, intentional misrepresentation of data, or a felony or misdemeanor involved certification services or moral turpitude. The existence of any of these situations affects the validity of a certification or any services performed and the state must be able to rescind approval under these circumstances.

2853. Commission Visits to Registry Participants' Sites

This section sets forth the process allowing the Commission to visit Registry participants' sites in order to confirm that a Registry participant has a program in place to prepare and submit the necessary information to the Registry and to evaluate the reasonableness of the information submitted. As directed by legislation, the Commission will need to assist the Registry in reporting to the legislature on the accuracy of the emissions inventories reported to the Registry; site visits mandated by legislation provide a mechanism for doing this.